89-1134

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1989

TUVIA BEN SHMUEL YOSEF,

Petitioner,

—v.—

THE PASSAMAQUODDY TRIBE, THE PENOBSCOT NATION, THE HOULTON BAND OF MALISEET INDIANS, THOMAS N. TUREEN, AND THE SHAWMUT BANK OF BOSTON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Should the Court resolve a direct conflict between the circuits whether a Fed.R.Civ.P. 12(b)(6) dismissal motion must be treated as a summary judgment motion, before the right to Fed.R.Civ.P. 41(a)(1)(i) voluntarily dismissal is extinguished?

2. Should the Court resolve a direct conflict between the circuits whether there is jurisdiction to impose Fed.R.Civ.P. 11 sanctions, after a Rule 41(a)(1)(i) voluntary dismissal notice is filed?

3. Should the Court address a breach of due process and departure from accepted and usual judicial proceedings by a court of appeals' validating sanctions imposed after voluntary dismissal, through (a) retroactively imputing a never-mentioned-below summary judgment motion to a Rule 12(b)(6) dismissal motion, (b) assigning to the appellant a claim of a limitations starting-date explicitly rejected by him, and (c) without notice, thereon adjudging a summary judgment?

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PARTIES TO THE PROCEEDINGS

The caption of the case on this petition's cover contains the names of all parties who were accounted to have been in the court of appeals. Counsel for the Department of Justice, representing another defendant, the Secretary of the Interior, was one of two counsel who did not request sanctions. The district court did not mention the Secretary in its decision. For that reason, the court below said it did not consider the United States to be a party.

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9 Wright & Miller, *Federal Practice and Procedure: Civil* § 2363, at 159 (1971) 25

OPINIONS BELOW

A copy of the opinion of the court of appeals and of the district court's memorandum and order, imposing sanctions, are appended hereto, beginning respectively at pages 1A and 9A *infra*. The court of appeals opinion is reported at 876 F.2d 283 (2nd Cir. 1989). The district court's decision is unreported.

JURISDICTION

The opinion of the court of appeals was given May 26, 1989, by Kaufman, J. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1). The Court granted petitioner's August 24, 1989 application, by order of Mr. Justice Marshall, signed September 25, 1989, extending the time within which to file this petition to and including October 23, 1989. (No. A-230.)

STATUTORY PROVISIONS INVOLVED

One of the two counsel representing the above respondent-defendants moved for sanctions under Fed.R.Civ.P. 11, reading in relevant part:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading . . . ; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court . . . shall impose upon the person who signed it . . . an appropriate sanction.

With no answer, summary judgment motion, or any kind of joinder of issue, the petitioner-plaintiff voluntarily dismissed, pursuant to Fed.R.Civ.P. 41(a)(1)(i), which provides:

> [A]n action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs. . . .

A later imposition of sanctions was affirmed by the court of appeals. To do so, it retroactively called upon Fed.R.Civ.P. 12(b)(6), which reads:

> Every defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted . . . . If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

STATEMENT

This case was begun by verified complaint, filed December 15, 1986. The action—containing elements of express and implied contract, tort, and for an accounting in equity—arises from the fruits of petitioner-plaintiff's work as sole counsel to the Indians of Maine for several years.

The petitioner is a New York resident. All the present respondent-defendants are Maine residents, except one, the Bank, from Massachusetts.

The Passamaquoddies, with whom the petitioner has a written contract, are the largest and most culturally-identifiable of the three close-family interrelated Maine Indian respondent groups. However, the work and its results, culminating in one general settlement, were for the unified benefit of them all.

Respondents made Fed.R.Civ.P. 12 motions to dismiss, alleging lack of jurisdiction, improper venue, and limitations, and they made Fed.R.Civ.P. 4(j) late–service-claim motions. One defense counsel also moved for Rule 11 sanctions. The petitioner replied to the opposition motions, submitting two affidavits and his own affirmation. He also made a Fed.R.Civ.P. 6(b) motion showing good cause for the 3-to-5-day overages in the complaint's service.

Respondents never served an answer, nor a motion for summary judgment. They served no affidavits, except short certifications of the dates of their respective receipts of the complaint. The only other papers offered were arguments of counsel.

There never was the slightest hint by anyone, including the district judge, of converting any motion to dismiss into one for summary judgment.

There never was a hearing on any item in the case, nor a single conference or a spoken word with the district judge. There ***had*** been a scheduled February 19, 1989 hearing for both sides' motions and the petitioner's request for expedited pre-answer discovery under the judge's Motion Practice Rules. However, two days before that hearing date, the judge's clerk telephoned, announcing its cancellation without explanation, and the petitioner was granted, instead, the right to make a further written submission on all pending items. Upon cautious deliberation, weighing the clerk's message as a portent of the judge's lack of absorbtion with the case's seriousness, the petitioner decided to file a Fed.R.Civ.P. 41(a)(1)(i) notice of voluntary dismissal without prejudice, and he did so on March 8, 1988.

On July 13, 1988, the district judge, Platt, C.J., awarded sanctions via a memorandum and order (pp. 9A-14A *infra*), hereinafter referred to as the decision.

The decision based jurisdiction for post-dismissal sanctions on an idea that Rule 11 motions made ***before*** voluntary dismissal—not afterward—supply sanctioning authority, because Rule 11, unlike other fee-awarding provisions, looks to the time of the criticized conduct, and is "not outcome oriented." *Id.*, p. 13A *infra*.[1]

As to any factual cause for sanctions, the decision cryptically stated, without explanation:

> There is no question that plaintiff's claims against the moving defendants and the Houlton Bank [sic] of Malisett Indians in this Court are meritless. Whether one or more of his claims might be sustainable elsewhere need not detain us here. The fact is that this Court has no diversity jurisdiction in a suit against the tribes or personal jurisdiction in a suit against the Indian tribes, Tureen and the Shawmut Bank.

Id., pp. 13A-14A *infra*. Nowhere, however, is it indicated ***why*** there is any such lack of jurisdiction.[2]

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[1] But, logically, if jurisdiction attaches at the offensive conduct's time, then the time of the Rule 11 motion's making should not matter.

[2] It had been carefully pointed out in the petitioner's affirmation before the district court that sovereign immunity was removed from these same Maine Indians by specific language of the settlement award legislation, *viz.* 25 U.S.C. § 1725(d)(1). Nevertheless, the appellate court, also, offered no reason for a finding of lack of jurisdiction, simply saying: "We agree that neither diversity nor federal question jurisdiction was present." Opinion, p. 7A *infra*.

On appeal, the Court of Appeals for the Second Circuit, which has traditionally held jurisdiction to be wholly lost by filing of a Rule 41(a)(1)(i) notice before an answer or summary judgment motion—at this juncture—decided to hold otherwise. It sought to restore the district court's lost jurisdiction by two extraordinary steps. First, it suspended Rule 41(a)(1)(i)'s operation via its own, afterwards-conceived motion for summary judgment, formulated at the appellate level and retroactively ascribed to the district court, with Judge Kaufman holding as to the dismissal motion,

> Because we believe the motion ***could have been treated as*** a request for summary judgment and granted, sanctions were properly imposed.[3]

—and conjunctively holding,

> We believe appellees' motion to dismiss was transformed into a request for summary judgment ***which Chief Judge Platt granted,*** and that he therefore retained the power to impose a fine.[4]

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[3] Opinion, p. 2A *infra*. Emph. supp.

[4] *Id.*, p. 5A *infra*. Emph. supp.

The inchoate "could have been treated as" version of the motion's handling counters the fait accompli "Chief Judge Platt granted" -one. Moreover, both versions flatly contradict the district court's own plain finding that:

> ***Before the merits in this case were reached,*** plaintiff filed a notice of dismissal pursuant to Federal Rule of Civil Procedure 41(a)(1)(i) on March 8, 1988.

Decision, pp. 9A-10A *infra*. Emph. supp.

Further, those two appellate versions are destructive of Rule 41(a)(1)(i)'s language precluding its own secret cut-off, through its express notice requirements that the answer or motion for summary judgment be manifested by "service" made by an "adverse party."

The court of appeals' second extraordinary step was to ignore the fact that Rule 12(b) conversions to summary judgment motions cannot be hung, ***with decisions thereon,*** upon voluntarily dismissing parties, no longer in court, so as to negate Rule 12(b)'s open due process guarantee that on conversion, "the motion shall be treated as one for summary

judgment and disposed of as provided in Rule 56, ***and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.***" Emph. supp. —Here, the petitioner, by filing his good faith voluntary dismissal, thereby canceled his rights to discovery, and to submit further written proofs and argument against a Rule 12 motion to dismiss, one of the allegations of which was an alternatively-dated limitations contention, upon which the court of appeals' summary judgment conjecture was later introduced.

The court of appeals made no mention of these severed rights to discovery and presentation of further submissions—the former, essential to determine a true statute of limitations running-date, and the latter, a decisive explanative asset, as there was never any district court hearing or oral argument.

Rather, the court of appeals perfected its *sua sponte* conversion of the Rule 41(a)(1)(i) voluntary dismissal without prejudice, into one with prejudice,

by assigning to a muted petitioner a never-made allegation of a starting-date for running of a 6-year statute of limitation. The petitioner, it said, appended an exhibit below, "to support his claim that the date from which the statute of limitations should run was January 7, 1981." (Opinion, p. 6A *infra*.) But, to the contrary, that date had been most explicitly rejected on page 26 of the petitioner's submitted district court document of record titled, Plaintiff's Affirmation in Opposition to Motions to Dismiss, where he stated:

> For the record, that Advice of Allotment is hereto attached as Exhibit H. Discovery vis a vis the Defendant Interior Secretary will, however, enable the Plaintiff to show that the January 7, 1981 approval by the Eastern Indian Department of its receipt of "Advice" of these moneys, does not mean that the moneys, themselves, were actually available for withdrawal or other use, until a still subsequent date, which would be the only date from which any statute of limitations could run. [Cited case

law authorities omitted.][5]

This is a matter begun by a complaint involving eighty-one and a half million dollars awarded as a result of the petitioner's years of uncompensated legal efforts for a minority group—at a price for which he, himself, was severely persecuted, as will be shown. Moreover, for bringing this suit, seeking, *inter alia*, the alternative of honoring his claims attorney contract for 10% of the award or allowing a *quantum meruit* one-third, he has suffered what has been called "a fine" (opinion, p. 5A *infra*)—propounded without hearing or any explained cause.

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[5] Also at p. 6A *infra*, immediately preceding the strange assertion that the petitioner had appointed the January 7, 1981 date, Judge Kaufman wrote, "In the district court, appellees submitted affidavits supplementing their motion to dismiss. The additional submissions supported their contention that they had not been properly served within the applicable limitations period." Those affidavits, however, relate solely to their Rule 4(j) motion. The Rule allots a 120-day period, merely regarding service after filing. Going over the 120 day line can produce dismissal ***without prejudice***, unless there is a showing of good cause, which good cause here was the subject of the petitioner's never-decided Rule 6(b) district court motion. Judge Kaufman thus commingled two "limitations" periods, and the affidavits—or certifications of the complaint receipt-dates—to which he referred cursorily, were not related to any Rule 12 dismissal motion.

No sworn attestation below gainsaid that it was the petitioner's years of research work, and his filing of the Maine Indian lands claims case that were responsible for the $81.5 million settlement of the Maine Indians' claims by Congress and the State of Maine, as provided by the Maine Indian Claims Settlement Act of 1980, P.L. 96-420, 94 Stat. 1795, 25 U.S.C. §§ 1721-1735.

In the same vein, his professional efforts were important enough, and the local mood against them so oppressive that, three days after he filed the Indians' land claims suit, his house and office were invaded warrantlessly by Maine State agents, who ultimately had him convicted, in 1969, on a sham "constructive" possession of marihuana charge. Concerned about an attorney's freedom to represent minority groups free from politically-motivated reprisal, the case produced the attention—and unsuccessful motions to appear as amici curiæ—of the American Civil Liberties Union and the National

Lawyers Guild. The record below includes the affidavit of Andrew Egendorf, Esq., assigned by the office of Ralph Nader to research "political use of marihuana charges." He attests:

> I am of the firmest belief that the charges against Mr. Ben Shmuel Yosef were entirely politically motivated, and that those charges existed solely because Mr. Ben Shmuel Yosef did his duty, which every lawyer is obligated to do; the protection of the rights of those deprived of their rights.[6]

See 58 VA. L. REV. 751, 758 (1972) n.43, decrying the absurdity of the conviction—which cost the petitioner a bar license for some years—even were the prosecution's facts believed true.[7]

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[6] However, those long-ago charges were a worked theme before the district court. Respondents' lawyers constantly used the words "felon" and "felony" in their writings, deflecting the judge's attention, denigrating the petitioner and his case, while ignoring Maine's later decriminalization of the offense and the petitioner's 1978 admission to the Israel Bar.

[7] "CONSTRUCTIVE POSSESSION IN NARCOTICS CASES: TO HAVE AND HAVE NOT," *ibid.*: "(Defendant said to a friend, 'Go roll Danny six sticks.' The friend did as directed after defendant had left the building he owned. Defendant's conviction for possession was sustained although no further evidence was presented linking defendant and the drug)." *Ibid.* The article's authors note the case as the lead constructive possession case that should not, and "would not have gotten to the jury"—had simple logic been observed in determining innocence or guilt. *Ibid.* Possession—both actual and "constructive"— (cont.)

It is undisputed that no part of the award has gone to compensate anyone for their work, and it is also undisputed that this situation is the direct result of the physical robbery from the petitioner of cartons containing all his Indian work files, by his former clerk, the defendant Tureen, a beneficiary of the Rule 11 sanctions award.[8]

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has, since 1975, been decriminalized in Maine. Chap. 499, § 51 of the 1975 Session Laws of Maine, now 22 M.R.S.A. § 2283: "Possession of a usable amount of marijuana is a civil violation for which a forfeiture of not more than $200 may be adjudged."

In addition to the petitioner having subsequently been admitted as a member of the Israel bar, he is a member of the bar of the Court of Appeals for the First Circuit, which re-issued him a certificate of good standing, after full disclosure of all the foregoing events. However, Judge Kaufman's opinion merely stated that petitioner "was convicted of possession of marijuana" and "was subsequently disbarred by the State of Maine," without mentioning the nexus of those events to his work for the Indians. Opinion, pp. 3A-4A *infra*. The opinion also treats at nought the undersigned's publicly-announced intention to be of use to his People when he immigrated to Israel in 1971 and became an Israel army combat officer, ultimately being ordained as a rabbi, saying instead, he "fled from Maine to Israel." *Ibid.* His ethnically based use, since that date, of the Hebrew name he was given by his parents at birth, a practice of many Jews who immigrate to Israel, was placed, as well, in questionable light, *viz.*: "There, Gellers ***adopted*** the name Tuvia Ben Shmuel Yosef." *Id.*, p. 3A. Emph. supp.

[8] Nevertheless, the opinion's implication of wrongdoing on the petitioner's part continued via its description of his effort at retroactive recognition for the seven years he served as the legal counsel for Maine's Indians. In its account of the (cont.)

Accordingly, with today's vagueness over Rule 41 (a)(1)(i)'s operation, one may file a voluntary dismissal relying on the Rule's words which invite him, under what seems clearly-specified conditions, to leave court without financial harm or substantive legal consequences, only for a future shock that those two realms have been severely and adversely threatened.

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re-submission of the petitioner's written contract with the predominant tribe to the Secretary of the Interior for retroactive approval, under 25 U.S.C. § 81, after his original contention had been established that Maine Indians were the same as other federally-recognized Indian groups, the implication was expressed by the sentence: "Although in his absence appellee Tureen became the Claims Attorney for the Passamaquoddies, [Ben Shmuel] Yosef resubmitted his contract with the tribe to the Secretary of the Interior in 1979." *Id.*, p. 4A *infra.* With this depiction, no mention was made of the record's attestation to Tureen's never-denied robbery of the case files and his utilization of his position, first, in his role as a law clerk furnished by the ACLU's Law Students' Civil Rights Research Council for helping in the petitioner's office, and then, as the petitioner's defense counsel in the constructive possession of marihuana allegation—to embezzle his Indian clients away from the petitioner. The opinion lashes at the petitioner on his seeking legal redress for this and, assigning no ground whatsoever, says of him, "He has manipulated the judicial system to an extraordinary degree." *Id.*, p. 8A *infra.*

REASONS FOR GRANTING THE PETITION

I.

This case presents important questions of federal law. The first is the necessity for the Court to resolve the split, created by the decision below, between the second circuit—versus the other circuits that have ruled on the issue, without exception requiring district judges to actually treat a motion to dismiss as one for summary judgment before extinguishment of the right to voluntarily dismiss under Rule 41(a)(1)(i).[9]

Thus, in *Manze v. State Farm Ins. Co.*, 817 F.2d 1062

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[9] As shown (p. 8 *supra*), the second circuit here went further, and said the district "could have" and somehow did accomplish a non-articulated extinguishment, although the district court did not do so, but acted in an opposite manner, as its decision shows, saying it never reached any merits of the case. ("Before the merits in this case were reached, plaintiff filed a notice of dismissal pursuant to Federal Rule of Civil Procedure 41(a)(1)(i) on March 8, 1988." Decision, pp. 9A-10A *infra*.) The district court decision also stated that it viewed its jurisdiction to sanction as preserved ***only*** because the sanctions motion pre-dated the Rule 41 dismissal notice. "The threshold question presented to the Court is whether a Federal Rule of Civil Procedure 11 motion filed before a Rule 41(a)(1)(i) dismissal survives the dismissal. ... Had the moving defendants brought their motion <u>after</u> plaintiff's voluntary dismissal, this Court clearly would have no authority to impose sanctions." *Id.*, p. 10A *infra*. (District court's emphasis.)

(3rd Cir. 1987), the defendant made a motion to dismiss under Rule 12(b)(6) and, "also requested costs, fees, and punitive damages on account of the plaintiffs 'frivolous' complaint" (817 F.2d at 1063). The plaintiff then voluntarily dismissed under Rule 41(a)(1)(i). The district court vacated that dismissal and awarded costs against the plaintiff. The Court of Appeals for the Third Circuit, in turn, vacated the sanction, reinstated the voluntary dismissal, and held, first: ". . . State Farm did not intend a Rule 56 motion by its motion to dismiss, nor did the district court treat it as such" (817 F.2d at 1066), and the third circuit then closed the door on all such *post facto* guessing by paraphrasing Rule 12(b)'s requirements of notice and of opportunity to respond appropriately, holding:

> On the other hand, the district court did not afford the parties reasonable opportunity to present material pertinent to a motion for summary judgment. *See* Fed.R.Civ.P. 12(b)(6).

Ibid.

Another circuit also most clearly holding this way

is the first. In *Universidad Central del Carib., Inc. v. Liaison Committee*, 760 F.2d 14 (1st Cir. 1985) it, too, faced the issue of whether to permit a district court to disregard plaintiff's Rule 41(a)(1)(i) voluntary dismissal and enter a dismissal with prejudice because there was pending at the time of plaintiff's Rule 41(a)(1)(i) filing a Rule 12(b)(6) motion to dismiss, which the defendant contended,

> . . . was implicitly treated by the district court as a motion for summary judgment, as provided in Rule 12(b). [Footnote.] That being so, the defendant argues that the terms of Rule 41(a)(1) became unavailable to the plaintiff, and the court's dismissal must have been under Rule 41(a)(2), which allows the court to impose conditions upon the dismissal.

760 F.2d at 17. In the above-referenced footnote, without commenting, the panel simply quoted the last sentence of Rule 12(b)(6), calling for actual treatment, as such, of any newly-converted summary judgment motion, and requiring all parties to have reasonable opportunity to respond

appropriately to it. The court then proceeded (760 F.2d at 17) to meet squarely, in its own words, the defendant's contention of an imputed summary judgment motion's existence:

> We reject this argument, because we can find nothing in the record that supports the contention that the district court treated the Rule 12 (b)(6) motion as a motion for summary judgment.

As noted, the district court's decision ***here*** declares that no merits were reached, and that therefore:

> The threshold question presented to the Court is whether a Federal Rule of Civil Procedure 11 motion filed before a Rule 41(a)(1)(i) dismissal survives the dismissal. In other words, has the Court retained any jurisdiction over the action to enable it to make a legally binding decision?

Id., p. 10A *infra*. Yet, exactly opposite to the first and third circuits—the second circuit has held:

> Because we believe the motion ***could have been treated*** as a request for summary judgment and granted, sanctions were properly

imposed.[10]

Emph. supp. It is essential that this Court clear the minefield of uncertainty created by the ruling below. The ruling not only means that no second circuit party may safely file a voluntary dismissal while there is pending a Rule 12(b)(6) dismissal motion that has any possible addend-paper for fear that, afterward, the motion may be ignited into one for summary judgment, it also means that parties in circuits that have not yet faced this issue must be unsure whether to file in same-type circumstances, lest their circuits decide to follow the instant ruling.

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[10] The opinion's citation (p. 6A *infra*) to *Carter v. Stanton*, 405 U.S. 669, 671 (1972) as a call to take its reins and do what the trial court in some fashion might have done, is not apposite. This Court there saw that, at a hearing in the parties' presence on a Rule 12(b)(6) motion, the district court received matters outside the pleading. With no issue to be raised before it either of lack of notice or of an evidence presentation opportunity, the Court observed that the district court had been required by Rule 12(b)(6) to "treat the motion" (*id.* at 671) as one for summary judgment, and in vacating, ***remanded*** "to that court for proceedings consistent with this opinion." (*Id.* at 672.) The case applies, rather, for another proposition. As explained (p. 7 *supra*), sanctions were imposed here, based on a proclaimed lack of personal and diversity jurisdiction, but neither the district court nor the circuit court said ***why*** jurisdiction was lacking. Such a decision must be vacated for being, "opaque and unilluminating as to either the relevant facts or the law." *Carter v. Stanton, supra* 405 U.S. at 671.

For instance, the ninth circuit has not specifically ruled on Rule 41(a)(1)(i)'s dependability while a Rule 12(b)(6) speaking motion is outstanding. (—Or, as here, while there is simply a Rule 12(b)(6) ***non***-speaking motion and a plaintiff's exhibited government memo.) That circuit has ruled more encompassingly, though, that ***whenever*** a court considers material dehors the pleading on a Rule 12(b)(6) motion, it must follow Rule 12(b)'s last sentence and give notice of its doing so to the parties. *Costen v. Pauline's Sportswear*, 391 F.2d 81, 84 (9th Cir. 1968). But now, even with no such Rule 12(b)(6) court notice, a cautious practitioner in a circuit requiring courts to give notice of conversions (see, *e.g.*, cases cited, note 11 *infra*), who is intending voluntary dismissal-filing against a Rule 12(b)(6) motion with addend-papers, is advised to consider that the second circuit had the same rule as the ninth's in *Costen*, and abrogated it in deciding the instant Rule 41(a)(1)(i) case. *Dale v. Hahn*, 440 F.2d 633,

638 (2nd Cir. 1971).[11] Thus, the split represents such disparity and disruption between the circuits that there is an immediate need for its resolution.

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[11] "It seems fair to include within the term 'reasonable opportunity' some indication by the court to 'all parties' that it is treating the 12 (b)(6) motion as a motion for summary judgment." *Dale v. Hahn, supra*, 440 F.2d at 638. Similarly: "F.R.Civ.P. 12(c) requires that before a Rule 12 motion may be converted into a summary judgment motion under Rule 56 'all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.'" *Calo v. Paine*, 521 F.2d 411, 414 (2nd Cir. 1975), citing *Dale v. Hahn, supra* and *Johnson v. RAC Corp.*, 491 F.2d 510, 514 (4th Cir. 1974). Going further, *Donaldson v. Clark*, 819 F.2d 1551, 1555 (11th Cir. 1987) vacated sanctions after a dismissal motion ripened into summary judgment, where the trial court did not heed the circuit's rule that no Rule 12(b)(6) conversion may occur without a ten-day notice of it to the non-moving party. In opposite polarity, ***no-notice*** summary judgment was authored by the second circuit, continually plying one word—"meritless"—from a district court decision that levied sanctions, but only for lack of jurisdiction. The decision, pp. 13A-14A *infra*, says: "There is no question that plaintiff's claims against the moving defendants and the Houlton Bank [sic] of Malisett Indians ***in this Court*** are meritless. Whether one or more of his claims might be sustainable elsewhere need not detain us here. The fact is that this Court has no diversity jurisdiction in a suit against the tribes or personal jurisdiction in a suit against the Indian tribes, Tureen and the Shawmut Bank." (Emph. supp.) The circuit court seized "meritless" and pounded it into a summary judgment, working its meaning from procedural to substantive, by saying, "the district court adjudicated the motion and found that the claims were meritless" (opinion, p. 2A *infra*); that it, "filed a memorandum and order finding all of his [petitioner's] claims meritless" (*id.*, p. 5A *infra*); and, again, that, "Chief Judge Platt found that appellant's claims were 'meritless.'" (*Id.*, p. 7A *infra*). And so, where a district judge ruled jurisdictionally and procedurally on a Rule 11 motion, the court of appeals found a whole summary judgment. (*Id.*, p. 2A *infra*).

II.

Given that a circuit court may not transform dismissal motions *ab initio* into summary judgment motions after Rule 41(a)(1)(i) voluntary dismissals, the attention of the Court is needed to resolve the conflict between the circuits whether a district court retains jurisdiction to impose Rule 11 sanctions after a Rule 41(a)(1)(i) voluntary dismissal filing. The undersigned points out respectfully that, although the issue treated under "I" *supra* would wreak havoc if left ***otherwise*** untended, a direct holding that the district court lost jurisdiction to impose sanctions when the voluntary dismissal was filed also means that the only jurisdiction the court of appeals had was to inquire into the district court's jurisdiction. Those were precisely the circumstances here. Consequently, reversal for the district court's lack of jurisdiction fells the edifice the court of appeals built by ignoring this issue and divining a summary judgment, and leaves no conflict between holdings

among the circuits on issue "I."

The fifth circuit's position on this jurisdictional issue is approvingly quoted in 9 Wright & Miller, *Federal Practice and Procedure: Civil* § 2363, at 159 (1971). That circuit holds clearly that Rule 41(a)(1)(i) dismissals terminate all jurisdiction over a plaintiff and his case. The case so quoted is *American Cyanamid Co. v. McGhee*, 317 F.2d 295, 297 (5th Cir. 1963), which said of the dismissal notice:

> That document itself closes the file. There is nothing the defendant can do to fan the ashes of that action into life and the court has no role to play. This is a matter of right running to the plaintiff and may not be extinguished or circumscribed by adversary or court. There is not even a perfunctory order of court closing the file. Its alpha and omega was the doing of the plaintiff alone. He suffers no impairment beyond his fee for filing.

Accord, *Williams v. Ezell*, 531 F.2d 1261, 1263 (5th Cir. 1976) holding that, since Rule 41(a)(1)(i) "means precisely what it says," orders made after the notice's filing are void, including an order emanating from a motion for attorney's fees, irrespective of when the

motion was made, as any post-dismissal order whatever must be "a nullity." *Id.* 531 F.2d at 1264.[12]

Furthermore, were terms or conditions of any sort permitted to be imposed after Rule 41(a)(1)(i) voluntary dismissals, it is difficult to see how the provision's existence is not ended by merger with Rule 41(a)(2). The latter is also a dismissal without prejudice, but one resulting from a district court order, "upon such terms and conditions as the court deems proper."

In the other direction, the lead cited case appears to be *Szabo Food Service, Inc., v. Canteen Corp.*, 823 F.2d 1073 (7th Cir. 1987), which arrives at its rationale using the rather extreme examples (823

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[12] Regarding the before-or-after-Rule-41-filing distinction made by the district court below, it may be observed additionally that, as Rule 11 provides for sanctions by a court "upon its own initiative," trying to vest a permanent jurisdiction over sanctions from the time of the sanction–motion's "bringing," so long as it is brought prior to the Rule 41 filing, results, with judge-generated sanctions, in the logical difficulty of the judge having to gauge when it was that he brought his own motion, so to speak. Here, after the Rule 41 filing, the judge not only awarded sanctions to moving counsel on a previously-made motion, he also awarded sanctions *sua sponte* to the court and to a non-moving counsel (decision, p. 14A *infra*), saying nothing about when he had become resolved to do so.

F.2d at 1078-79), first, of a plaintiff who deliberately refuses to pay his court fee, and then of one who:

> . . . punches the judge in the nose, and as the judge reaches for a handkerchief to staunch the bleeding, tenders a dismissal under Rule 41(a)(1)(i). In reply to the inevitable citation for contempt of court, the plaintiff could not say: "I wasn't there in the eye (nose?) of the law; nothing happened for which I am responsible; for 'it is as if the suit had never been brought'."

Szabo thus reaches its conclusion, apprehending a legal chamber of horrors. But, by its own words—"the inevitable citation for contempt of court," it tells us that Rule 11 is not needed for its severe examples. There is 18 U.S.C. § 401, which provides, *inter alia*:

> **Power of court**
>
> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as-
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
> . . .
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

—This is a constantly-operating ***criminal*** jurisdictional provision, in tandem with all proceedings.

Unlike Rule 11's partial malpractice codification effort, its common law ancestry has been in place for centuries, producing far less troublesome litigation and fewer uncertain outcomes than Rule 11.[13]

Rule 11 need not be elevated over Rule 41(a)(1)(i) by examples that do not take note of 18 U.S.C. § 401. It is respectfully submitted that good jurisprudence seems hardly served by viewing Rule 11 as a substitute for a criminal statute.

Szabo's approach was, however, followed by the first circuit in *Muthig v. Brant Point Nantucket, Inc.*, 838 F.2d 600, 603-4 (1st Cir. 1988) and by the eighth, independently, in *Kurkowski v. Volker*, 819 F.2d 201, 203 (8th Cir. 1987) (giving as a basis the court's common law, "inherent authority over the cases and parties before it"). Similarly, in *Greenberg v. Sala*, 822 F.2d 882, 885 (9th Cir. 1987) the ninth circuit

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[13] Among many scholarly critiques of Rule 11's chilling effect upon normal litigation, Joseph, *The Trouble with Rule 11—Uncertain Standards and Mandatory Sanctions*, 73:8 A.B.A. J. 87, 90 highlights the ultimate conclusion that this Court performs an immense service with each decision it undertakes for bringing more uniformity and predictability to Rule 11's operational sphere.

manifested how it would follow *Szabo*.

Until its decision in the instant case, the second circuit was equidistant as the fifth from *Szabo's* school of thought on jurisdiction to impose Rule 11 sanctions after filing of a Rule 41(a)(1)(i) voluntary dismissal. The opinion below here is at odds not only with the fifth circuit, but with the tide of all the second circuit's previous rulings on the subject which, in the over half-century since 1938 when Rule 41 was first promulgated, have always held that no sanctions may be imposed and that nothing whatever may be done by a district court, absent conscious joinder of issue, once a plaintiff files his Rule 41(a)(1)(i) notice of voluntary dismissal. Where a motion concerning fees was made before plaintiff's Rule 41(a)(1)(i) filing, *Santiago v. Victim Services Agency*, 753 F.2d 219, 223 (2nd Cir. 1985) had recently reiterated the circuit's view in this manner:

> We therefore hold that the district court lacked jurisdiction to award attorney's fees after appellants had filed a notice of dismissal and

> that the court's attempted reservation of jurisdiction was void. In doing so, we reaffirm our past holdings in *Kilpatrick* [166 F.2d 788] and *Thorp* [599 F.2d 1169] that the only events that can cut off a plaintiff's unilateral right to dismiss an action under Rule 41(a)(1) are the filing [sic] of an answer or a motion for summary judgment.[14]

Central to this split between the circuits is the observation in *Santiago, supra*, as follows:

> Although the rule has undergone four amendments, Congress consistently has avoided vague terms and has left no discretion to the courts to determine the point at which the plaintiff may dismiss the action. *Id.* [*Thorp v. Scarne*, 599 F.2d 1169] at 1175-76. ***Adherence to this bright line is necessary to apprise both plaintiffs and defendants of their relative rights and options in proceeding with the litigation.***

Santiago, 753 F.2d at 222. (Emph. supp.)

Resultantly, certiorari's necessity is increased, since by its current opinion retreating from *Santiago* and

[14] In setting aside Rule 11 sanctions imposed subsequently to a Rule 41(a)(1)(i) dismissal, *Johnson Chemical Company v. Home Care Products, Inc.*, 823 F.2d 28, 31 (2nd Cir. 1987), unlike the district court below here, experienced no hesitancy over the fact that the overturned legal fees in *Santiago* were awards under 42 U.S.C. § 1988, and not under Rule 11. The panel stressed:

> As a result of our decision, the district court orders subsequent to the dismissal became a nullity. Once Johnson had dismissed the action under Rule 41(a)(1)(i), the court lost all jurisdiction over the action. *Santiago*, 753 F.2d at 221, 222-23 & n. 3; *Williams v. Ezell*, 531 F.2d 1261, 1263-64 (5 Cir. 1976). The F.R.C.P. Rule 11 sanctions, therefore, are vacated.

Johnson, supra, and seeking to avoid deciding whether making a Rule 11 motion halts a plaintiff's right to a Rule 41(a)(1)(i) dismissal,[15] the second circuit has put one foot down on each side of its own "bright line."

Coming from a circuit with the previous clear-cut history of the second's, this is a particularly unsettling signal for counsel and parties in all circuits, emitting uncertainty for filing Rule 41(a)(1)(i) voluntary dismissals, everywhere. Accordingly, the Court's hand is needed to resolve the issue that is actual and central to the case; that the district court here dealt with exclusively, and which is in disarray among the circuits—whether jurisdiction exists for sanctions after voluntary dismissal.

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[15] "In view of our disposition of this appeal, we need not consider whether a district court retains jurisdiction to impose Rule 11 sanctions under circumstances where . . . the defendant has filed a motion for sanctions before the plaintiff files a motion for voluntary dismissal under Rule 41(a)(1)(i)." Opinion, p. 5A, n.3 *infra*. —In this fashion, the circuit turned away from its constant view—and that of the fifth's—that a Rule 41 (a)(1)(i) voluntary dismissal without prejudice is a legal bar against all claimed litigation inconvenience.

III.

The Court's attention is also required to remedy the procedural due process failure represented by the court of appeals opinion, and its departure from the accepted and usual course of judicial proceedings.

Thorp v. Scarne, 599 F.2d 1169, 1171 (2nd Cir. 1979), in the same vein as *Santiago, supra*, after first holding, "the law is settled that the filing of a notice of dismissal under Rule 41(a)(1)(i) automatically terminates the lawsuit," went on to observe:

> [S]ummary judgment "in the air" simply does not satisfy the explicit Rule 41 requirement that a defendant follow one of two specified courses of action in order to terminate plaintiff's right to dismiss his action without prejudice... .

Id. 599 F.2d at 1174. Although the opinion below purports to decide that upon which *Thorp* remarked without ruling—whether a Rule 12(b)(6) motion could ripen into a summary judgment motion and prevent voluntary dismissal (opinion, p. 7A *infra*)—*Thorp*, however, was seeing a summary judgment motion's ***actual entertainment by a district court*** that

had vacated a plaintiff's Rule 41(a)(1)(i) notice-filing, but happened to have no real speaking motion before it. In thus saying (599 F.2d at 1174) that it had no occasion to decide whether a Rule 12(b)(6) speaking motion might qualify to become one for summary judgment and afterward prevent Rule 41(a)(1)(i)'s exercise, *Thorp* could not—in light of its above-quoted strict-construction language, its facts, and in light of due process—have been talking of ***both*** such a ripening ***and an appellate in-chambers decision thereon,*** for springing on a voluntarily-dismissing plaintiff, who is thereby stripped of Rule 12(b)'s provision that, on any such ripening, "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."[16]

[16] *Thorp* also cited other hurdles to Rule 41(a)(1)(i)'s suspension under those circumstances. They are its specifications (a) that there be "service" of an answer or of a summary judgment motion, and (b) that the service must be "by the defendant." *Thorp*, 599 F.2d at 1173, n.7. See *Aero-Colours, Inc. v. Propst*, 833 F.2d 51 (5th Cir. 1987) for a definitive holding that filing an answer, ***but not serving it***, does not prevent plaintiff from then filing an effective notice of voluntary dismissal without prejudice, and *Winterland Concessions Co. v. Smith*, 706 F.2d 793, 795 (7th Cir. 1983), requiring the answer's actual service, as the Rule "was intended to establish a test that would be easy to administer."

Equally unsettling from a fifth amendment—and judicial seemliness—perspective is an appellate court's envisaging summary judgment on a factually-erroneous basis, with no such motion ever sensed below, and then adjudicating it retroactively from chambers, without notice. By the court of appeals declaration that his Rule 41(a)(1)(i) notice is null, and that, with no chance to respond, he is out of court on the merits—for having filed a dismissal notice after an unknown, unperceived, and unintended summary judgment motion—it is clear that the petitioner is totally prejudiced, and would have taken an opposite course, with any notice of what he faced. Had he known that reputation, case status, and money were in jeopardy, without warning or input to forestall it, he would, instead, have submitted his allowed written presentation; he would have pressed for discovery of the exact date the award money became available from the Interior Department; and any rulings adverse to him would have been appealable directly on their merits.

In addition to its due process depredations, the court of appeals opinion gratuitously and extraordinarily ruled on that which could not have been conceivably before it, as a matter of law.[17]

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[17] Indeed, it sought to reach out and decide a melange of defunct issues, with neither hearing, notice, nor foundation. This included the respondents' Rule 4(j) motion to dismiss without prejudice, and the petitioner's motion for an enlargement under Rule 6(b)(2), both left undecided by the district court, with the filing of the notice of voluntary dismissal. Howbeit, the opinion states (p. 4A *infra*):

> [Ben Shmuel] Yosef filed this action in the Eastern District of New York on December 15, 1986. Appellees were not served until April 1987. This was beyond the 120 day period mandated by Fed. R. Civ. P. 4(j). . . .
>
> In December 1987, the parties stipulated that all papers relating to the motion to dismiss [—in fact, two motions, one under Rule 4(j); the other under Rule 12] would be filed and served by appellant no later than January 11, 1988. Nonetheless, on February 8, 1988, [Ben Shmuel] Yosef filed a motion for an enlargement of time, claiming that there was good cause for his failure to timely complete service of process.

And it concludes as to the Rule 6 motion (p. 8A *infra*):

> On appeal, [Ben Shmuel] Yosef described his failure to timely complete service as a "minimal miscalculation." This excuse does not hold water. Moreover, his request for an enlargement came too late—nearly a month after the date set by the court for the submission of all papers.

It must be pointed out that this account of untimeliness is contradicted by the stipulation's wording, declaring that it is not signed or agreed to by the petitioner, and by the order, itself, which does not speak about "the submission of all papers," nor of "all papers relating to the motion to dismiss," but requires, rather, that, "plaintiff's responsive papers to all motions previously filed herein be served and filed no later than January 11, 1988"—in no way hindering any new motion's making. Similarly, inspection of the text of the petitioner's Rule 6 district court combined notice-of-motion-and-motion for an enlargement of time, from which the above "minuscule miscalculation" phrase is miscopied and then mislabelled as having been stated on appeal, shows that text to actually read: "... with good cause for this comparatively-minuscule delay appearing per the enclosed supporting (cont.)

The opinion in this respect is an unseemly aberration from normal appellate court functioning, standing as a disorderly precedential potential for similar cases within the federal court system.

> This Court has maintained the difference between appellate jurisdiction and original jurisdiction at least since *Marbury v. Madison*, 1 Cranch 137, 174-176, 2 L.Ed. 60 (1803) ("It is the essential criteria of appellate jurisdiction that it revises and corrects the proceedings in a case already instituted"). I do not understand how the Court can say that the Court of Appeals had discretion to perform a non-appellate act. . . . By deciding that there were no disputed issues of fact, the Court of Appeals seems to have decided a motion for summary judgment that was not before it. This is the kind of issue that district court judges decide every day in the ordinary course of business. It is not the kind of issue that Courts of Appeals determine. . . . That judges of a court of appeals believe they know how a case should be decided is no reason for them to substitute their own judgment for that of a district judge without regard to the normal course of appellate procedure.

Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 35-36 (1983) (dissent). Lacking special statutory countervailing federal policy as in *Cone*, the

affidavit of Dr. Lawrence D. Spiegel ...." It thus turns out that, "This excuse does not hold water" is a rejection of what was not offered anywhere at all as an excuse, but that the motion's good cause is in Dr. Spiegel's affidavit which, with another actual ground delineated in the notice-of-motion-and-motion, is compellingly reasonable.

instant case is a more proper instance for reversal in its departure from the "accepted and usual course of judicial proceedings," as that concept is expressed in the Court's Rule 17.1(a), accenting its supervisory role over the federal judicial system. Not only did a court of appeals here give a decision on an issue that was not considered by the district court, but it did ***not*** make a decision on the Rule 41(a)(1)(i) issue, the only one with which it was properly vested. Moreover, there can be unanimity here that, from the public face of the two court rulings below, not even one of the issues the court of appeals took upon itself to resolve could in law or logic have been the subject of any part of the appeal or discussion before it. It is no wonder then that, in deciding those issues *ex gratia*, the circuit court's recitations of their facts do not reflect an adversary system at work.

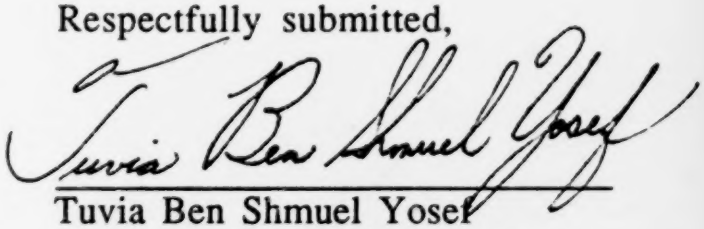
In sum, the petitioner could not have known on filing a voluntary dismissal that the district court would depart from the circuit's long line of rulings insuring

unfettered Rule 41(a)(1)(i) nonsuits, only to sanction him in an opaque and cryptic manner. Nor could he have known when he appealed from that jurisdiction-less decision that the very appeal should cost him the merits of his case. This joinder of unfairness and unseemliness makes particularly apropos *Donaldson v. Clark*'s (*supra* 819 F.2d at 1558) assurance that, "Attorneys and clients facing possible discipline under Rule 11 have interests qualifying for protection under the Due Process Clause of the Fifth Amendment. Procedural due process requires notice and an opportunity to be heard before any governmental deprivation of a property interest."

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1005—August Term, 1988

(Argued May 5, 1989 Decided May 26, 1989)

Docket No. 88-6201

TUVIA BEN SHMUEL YOSEF,

Plaintiff-Appellant,

—v.—

THE PASSAMAQUODDY TRIBE, THE PENOBSCOT NATION, THE HOULTON BAND OF MALISEET INDIANS, AND THE SHAWMUT BANK OF BOSTON,

Defendants-Appellees.

Before:

KAUFMAN, FEINBERG, and NEWMAN,

Circuit Judges.

Appeal from an order imposing sanctions pursuant to Federal Rule of Civil Procedure 11, entered by the United States District Court for the Eastern District of New York (Platt, *C.J.*), following Tuvia Ben Shmuel Yosef's

attempt to voluntarily dismiss his action under Federal Rule of Civil Procedure 41(a)(1)(i).

Affirmed.

TUVIA BEN SHMUEL YOSEF, Forest Hills, NY, *for Plaintiff-Appellant, pro se.*

James B. Weber, (Tureen & Margolin, Portland, Maine) submitted a brief *for Defendants-Appellees.*

KAUFMAN, *Circuit Judge*:

We are asked to decide whether a party who initiates suit in federal court loses the right to unilaterally dismiss his action when, more than nine months before, the defending parties challenged the sufficiency of his complaint in a motion to dismiss for failure to state a claim and also sought the imposition of penalties. Despite appellant's attempted dismissal, the district court adjudicated the motion and found that the claims were meritless and imposed penalties. Because we believe the motion could have been treated as a request for summary judgment and granted, sanctions were properly imposed. We affirm.

Tuvia Ben Shmuel Yosef, formerly a member of the Maine bar and then known as Don Gellers, brought this *pro se* action against the Secretary of the Interior ("the Secretary"),[1] the Passamaquoddy Tribe, the Penobscot

1 The opinion below does not refer to the Secretary of the Interior, who, consequently is not a party to this appeal. We therefore do not consider appellant's claims against the United States.

Nation and the Houlton Band of the Maliseet Indians ("the Tribes"), the Shawmut Bank of Boston ("the Bank"), and Thomas Tureen, claiming that his legal work resulted in the passage of the Maine Indian Claims Settlement Act of 1980, P.L. 96-420, 94 Stat. 1785, 25 U.S.C. §§ 1721-1735.[2]

Appellant asserts that the passage of the Act gave him the right to recover $27 million dollars in *quantum meruit* from the $81.5 million dollar fund created by the Act, pursuant to an alleged contingency fee agreement he had with the Passamaquoddy Indians. He claims appellee Tureen caused a large part of the funds awarded the Indians to come into the hands of the Bank, and alleges the Bank had a duty to avoid acquisition of the funds.

Yosef apparently served as an attorney for the Passamaquoddy tribe from 1964 to 1971, under a Claims Attorney Contract pursuant to 25 U.S.C. § 81. The contract provided that it would continue in force for ten years from the date of its approval by the Secretary of the Interior. On September 7, 1967, appellant submitted the contract to the Department of the Interior for approval as required by § 81. The Secretary declined to approve it because he believed the Passamaquoddies were not, at that time, a federally recognized tribe.

Despite this development, appellant continued to represent the tribe until 1971, when he was convicted of possession of marijuana and fled from Maine to Israel. There, Gellers adopted the name Tuvia Ben Shmuel Yosef. He

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2 The purpose of the Act was to provide for Congressional ratification and implementation of a settlement of land claims raised by the three Maine Indian Tribes to as much as two-thirds of the lands comprising the State of Maine. *See* H.R. Rep. No. 1353, 96th Cong. 2d Sess. 11, *reprinted in* 1980 U.S. Code Cong. & Admin. News 3786, 3787.

was subsequently disbarred by the State of Maine. Although in his absence appellee Tureen became the Claims Attorney for the Passamaquoddies, Yosef resubmitted his contract with the tribe to the Secretary of the Interior in 1979. This time the Secretary declined to accept the agreement because the tribe would not ratify it. Appellant concedes he did not have any contractual arrangement with the Penobscot Nation or the Houlton Band of the Maliseets.

Yosef filed this action in the Eastern District of New York on December 15, 1986. Appellees were not served until April 1987. This was beyond the 120 day period mandated by Fed. R. Civ. P. 4(j). In addition to a motion to dismiss for failure to complete service of process within the time period mandated by Rule 4(j), appellees filed motions to dismiss on various other grounds including absence of federal question jurisdiction, diversity jurisdiction, personal jurisdiction, and lack of standing. They also moved, pursuant to Fed. R. Civ. P. 12(b)(6), for dismissal on the ground that the complaint failed to state a claim upon which relief could be granted because the statute of limitations had expired. Shortly thereafter, the Tribes and the Bank moved for sanctions under Fed. R. Civ. P. 11. In opposing the Rule 12(b)(6) motion, appellant presented an "affirmation" and new exhibits to the court. Appellees were then permitted to file reply memoranda.

In December 1987, the parties stipulated that all papers relating to the motion to dismiss would be filed and served by appellant no later than January 11, 1988. Nonetheless, on February 8, 1988, Yosef filed a motion for an enlargement of time, claiming that there was good cause for his failure to timely complete service of process.

More than eight months after appellees moved to dismiss, and before Chief Judge Platt rendered his decision, appellant asked for dismissal of the action pursuant to Fed. R. Civ. P. 41(a)(1)(i). The court then filed a memorandum and order finding all of his claims meritless and imposing sanctions directing him to pay $4,000 to the attorneys for the Tribes, Bank, and Tureen, and $1,000 in costs and expenses. Chief Judge Platt determined that diversity jurisdiction did not exist for the claims against the Tribes and that no personal jurisdiction existed over the Tribes, Tureen or the Bank. On appeal, Yosef urges us to reverse these findings on the theory that, following his effort to voluntarily dismiss the suit, the district court lacked authority to impose sanctions.

This court has liberally construed Rule 41(a)(1)(i), which allows plaintiffs to voluntarily dismiss an action. We have generally held that a valid dismissal deprives a court of authority to adjudicate any matters subsequently presented including sanctions, *Johnson Chemical Co. v. Home Care Products*, 823 F.2d 28 (2d Cir. 1987) and attorney's fees, *Santiago v. Victim Services Agency*, 753 F.2d 219 (2d Cir. 1985).[3] But, we recognized a limit. We noted that a defendant may cutoff a plaintiff's right to terminate an action by filing an answer or moving for summary judgment. *See Johnson*, at 30, citing *Santiago*. We believe appellees' motion to dismiss was transformed into a request for summary judgment which Chief Judge Platt granted, and that he therefore retained the power to impose a fine.

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3 In view of our disposition of this appeal, we need not consider whether a district court retains jurisdiction to impose Rule 11 sanctions under circumstances where a motion to dismiss under Rule 12(b)(6) does not ripen into a motion for summary judgment but the defendant has filed a motion for sanctions before the plaintiff files a motion for voluntary dismissal under Rule 41(a)(1).

Among other things, Rule 12(b)(6) provides that if, on a motion to dismiss for failure to state a claim, matters outside the pleadings are presented to the court and not excluded, the motion "shall be treated as one for summary judgment." The Advisory Committee Notes on the Rules recognize numerous cases where district courts have permitted the introduction of matter beyond the pleadings to support or resist a motion to dismiss for failure to state a claim, and then converted the motion to one for summary judgment. *E.g.*, *Samara v. United States*, 129 F.2d 594 (2d. Cir.), *cert. denied*, 317 U.S. 686 (1942); *see National Cement Inc. v. Mead Corp.*, 80 F.R.D. 703 (S.D.N.Y. 1978).

In the district court, appellees submitted affidavits supplementing their motion to dismiss. The additional submissions supported their contention that they had not been properly served within the applicable limitations period. Additionally, Yosef appended an exhibit, titled "Advice of Allotment," to support his claim that the date from which the statute of limitations should run was January 7, 1981. Moreover, in the portion of his "Affirmation" that responded to appellees' statute of limitations arguments, Yosef referred to various letters he had sent to an official of the Bureau of Indian Affairs. These submissions were not excluded by the court and have become a part of the record on appeal. Accordingly, it is appropriate to treat the motion to dismiss under Rule 12(b)(6) as one for summary judgment. *See Carter v. Stanton*, 405 U.S. 669, 671 (1972).

Rule 41(a)(1)(i) provides that service of an answer or summary judgment motion marks the point at which the plaintiff's unilateral right to dismiss the action terminates. Consequently, where a 12(b)(6) motion ripens into one for

summary judgment, the right to voluntary dismissal is extinguished at the time the motion is served. *See Kurkowski v. Volcker*, 819 F.2d 201, 203 (8th Cir. 1987); *Exxon Corp. v. Maryland Casualty Co.*, 599 F.2d 659, 661 (5th Cir. 1979); 5 Moore's Federal Practice 41.02[3] at 41-26-27 (2d ed. 1988). Accordingly, the district court retained jurisdiction to impose sanctions, even after appellant attempted to dismiss the case. *Kurkowski*, 819 F.2d 201, at 203. Our holding in *Thorp v. Scarne*, 599 F.2d 1169 (2d Cir. 1979), is not to the contrary. In *Thorp* we explicitly declined to address the issue we decide today—whether a motion to dismiss, if accompanied by matter dehors the pleading, qualifies as a motion for summary judgment for Rule 41(a)(1)(i) purposes. *See id.*

Appellees were successful on their motion. Chief Judge Platt found that appellant's claims were "meritless." He also held that he did not have diversity jurisdiction in a *quantum meruit* suit against the Tribes. Moreover, the district judge found appellant had failed to establish personal jurisdiction against the Tribes, Tureen and the Shawmut Bank. We agree that neither diversity nor federal question jurisdiction was present.

Even if appellant had been able to establish diversity jurisdiction and obtain personal jurisdiction, the action would have been governed by the applicable state statute of limitations. *See Morse v. Elmira Country Club*, 752 F.2d 35 (2d Cir. 1984). All parties agree that the applicable statute of limitations was six years. Thus, if we adopt appellant's assertion that his action did not accrue until January 7, 1981, it is time-barred—even assuming he was deserving of the benefit of a sixty day extension pursuant to N.Y. CPLR § 203(b)[5].

Left unresolved by the district court's order was the issue of appellant's failure to comply with the 120 day period for service of the complaint. Dismissal of an action is mandatory under Rule 4(j) when the 120 day limit is violated unless "good cause" can be shown. *Lovelace v. Acme Markets Inc.*, 820 F.2d 81, 84 (3d Cir.), *cert. denied*, 108 S. Ct. 455 (1987).

On appeal, Yosef described his failure to timely complete service as a "minimal miscalculation." This excuse does not hold water. Moreover, his request for an enlargement of time came too late—nearly a month after the date set by the court for the submission of all papers.

The revised Rule 11 states emphatically that the court "shall" impose sanctions whenever a violation of the rule is discerned. Fed. R. Civ. P. 11 Advisory Committee Note to 1983 amendment. *Accord Eastway Construction Corp. v. City of New York*, 762 F.2d 243 n. 7 (2d Cir. 1985). Appellant's claims were patently frivolous. He has manipulated the judicial system to an extraordinary degree. Chief Judge Platt clearly did not err in imposing sanctions.

We have considered the other issues raised on appeal and find them without merit. Accordingly, we affirm.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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TUVIA BEN SHMUEL YOSEF,

Plaintiff,

-against-

THE PASSAMAQUODDY TRIBE, THE PENOBSCOT NATION, THE HOULTON BAND OF MALISEET INDIANS, WILLIAM P. CLARK, AS SECRETARY OF THE INTERIOR, THOMAS TUREEN, AND THE SHAWMUT BANK OF BOSTON,

Defendants.

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MEMORANDUM AND ORDER

PLATT, Chief Judge

The basis of this action was a quantum meruit claim by plaintiff against defendants for legal work supposedly done between 1964 and 1971. Plaintiff sought $27 million for his services on behalf of the tribes, alleging that his efforts helped them receive a large settlement from the State of Maine some years later.

Before the merits in this case were reached, plaintiff filed a notice of dismissal

pursuant to Federal Rule of Civil Procedure 41(a)(1)(i) on March 8, 1988. Defendants, the Passamaquoddy Tribe, the Penobscot Nation, Tureen and the Shawmut Bank of Boston, who had filed a motion for Rule 11 sanctions on May 18, 1987, now ask that the Court rule on that motion.

The threshold question presented to the Court is whether a Federal Rule of Civil Procedure 11 motion filed before a Rule 41(a)(1)(i) dismissal survives the dismissal. In other words, has the Court retained any jurisdiction over the action so as to enable it to make a legally binding decision?

Had the moving defendants brought their motion after plaintiff's voluntary dismissal, this Court clearly would have no authority to impose sanctions. In Santiago v. Victim Services Agency of Metropolitan Assistance Corp., 753 F.2d 219 (2d Cir. 1985), on which plaintiff relies, the Court held

that an award of attorneys' fees under 42 U.S.C. section 1988 had been invalidly granted by the District Court after a Rule 41(a)(1)(i) dismissal of the underlying suit. Id. at 21. Unlike this case, the sanctions were not based on Rule 11 and the motion for sanctions had been filed two months after the voluntary dismissal. A similar situation occurred in Johnson Chemical Co., Inc. v. Home Care Products, Inc., 823 F.2d 28 (2d Cir. 1987), where the Court concluded that the District Court had improperly vacated Rule 41(a)(1)(i) dismissal and imposed sanctions after the voluntary dismissal. Id. at 31. Since the dismissal turned out to be valid, the Court could not grant a motion for sanctions filed later.

Both Santiago and Johnson state clearly that any orders respecting sanctions issued from the District Court after a voluntary dismissal are null, when the motion for sanctions is made following the dismissal. Johnson, 823 F.2d at 31

("[T]he district court's order subsequent to the dismissal became a nullity."); Santiago, 753 F2d at 221 ("A subsequent order granting attorney's fees is a nullity."). This position implies that the Court may not impose sanctions even when the motion for sanctions was filed prior to the dismissal.

Two courts in the Southern District of New York, however, have ruled that a Rule 11 motion filed before a Rule 41(a)(1)(i) dismissal does survive and the Court may rule on it.[1] In Fisher Bros. Sales v. United Trading Co. Desarrolo v. Comericio, S.A., 1988 U.S. Dist. LEXIS 3357 (S.D.N.Y. April 15 1987), Judge Lowe held that a District Court may rule on a Rule 11 motion filed prior to a Rule 41(a)(1)(i) dismissal. The Court distinguished Santiago by noting that it had involved sanctions under 42 U.S.C. section 1988, which gives the District Court only limited discretion. When a case under the Civil Rights Act is voluntarily dismissed,

the Court may not then impose sanctions under section 1988.

> In contrast, Rule 11 and Section 1927 sanctions are not outcome oriented but rather assess the conduct of attorneys and litigants in instituting and continuing meritless litigation. Once. . . counsel signed and filed its pleading, the federal court acquired jurisdiction and retained jurisdiction, even after dismissal of the action, to decide a Rule 11 or Section 1927 claim.

Fisher Bros., LEXIS 5355 at 3; see also Solloway v. Ellenbogen 1988 U.S. Dist. LEXIS 5355 (S.D.N.Y. June 8, 1988). Since these two cases specifically found that a Rule 11 motion filed prior to a Rule 41(a)(1)(i) dismissal may be ruled on by the Court, we must reject plaintiff's argument that this Court may not rule on defendants' motion and move on to the merits of the Rule 11 claim.

There is no question that plaintiff's claims against the moving defendants and the Houlton Bank of Malisett Indians in this Court are meritless. Whether one or more of his claims might be sustainable elsewhere need not detain us here.

The fact is that this Court has no diversity jurisdiction in a suit against the tribes or personal jurisdiction in a suit against the Indian tribes, Tureen and the Shawmut Bank.

Under the circumstances, plaintiff is directed to pay to the attorneys for the moving defendants and the Houlton Bank of Malisett Indians, $4000 to be divided equally between them for attorneys' fees and expenses and $1,000 to this Court for costs and expenses.

SO ORDERED.

S/ Thomas C. Platt
Chief Judge, U.S.D.C.

Dated: Brooklyn, New York
July 13, 1988

FOOTNOTE

[1] The circuits generally agree on this issue. The First and Seventh Circuits have held that a Rule 11 motion survives a 41(a)(1)(i) dismissal. Muthig v. Brant Point Nantucket, Inc., 838 F.2d 600, 603-04 (1st Cir. 1988); Szabo Food Service, Inc. v. Canteen Corp., 823 F.2d 1073, 1076-79 (7th Cir. 1987), cert. denied, 108 S. Ct. 1011, while the Eighth Circuit reached the opposite conclusion in Foss v. Federal Intermediate Credit Bank, 808 F.2d 657, 660 (8th Cir. 1986), then effectively overruled Foss the next year in Kurkowski v. Volcker, 819 F.2d 201, 203 (8th Cir. 1987).